SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

On Writ of Certorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

SUMMARY OF ARGUMENT

The issue here concerns the Federal Communications Commission's authority under Title V of the Independent Offices Appropriations Act of 1952, as interpreted by the Bureau of the Budget Circular No. A-25 of 1959, to exact its particular CATV annual charges imposed

in 1970, and not its authority to exact charges generally. That above authority permits a fee to be charged where there is an identifiable recipient of an agency's service from which he receives a special benefit or other thing of value.

To support its claims that the annual charges are proper, the Commission alleges that its regulatory scheme is of special benefit to the CATV industry as a whole. If each CATV system availed itself of the requisite benefits each year it paid the annual fee the Commission's theory could not be faulted. But the bulk of existing CATV system paying the annual fee in 1970 have never made any request or filing with the Commission in the course of the year. Thus, many identifiable CATV systems have never received from the Commission a "measurable unit" of service from which they obtain a "special benefit." Consequently, the Commission has not overcome its obvious inability to identify the special benefit provided in 1970 to each CATV system required to pay the annual fee.

The Commission does argue that it provides a general "authorization" of CATV operations as a result of its regulation. A CATV system does not require Commission authority to operate. This authority is granted at the local or state level. The so-called "authorization" of which the Commission speaks is the regulatory method by which it restricts CATV systems' competition with television broadcast stations by preventing certain signal carriage. Neither do the Commission's claims, subsequent to its *Report and Order,* of special benefit from its telephone cross-ownership regulations support its annual fee.

The Commission's repeated references in its brief to its 1972 CATV regulation is improper. These regula-

tions did not exist at the time the 1970 annual fee was established. Nor were they considered by the Fifth Circuit in the decision now before this Court for review.

The Commission alleges that it has complied with the terms of the Bureau of the Budget Circular No. A-25, In fact, the Commission, in its argument, ignored the Budget Bureau's specific illustrative examples of special benefit. A review of these examples makes it clear that the special benefit to be provided involves the receipt of a formal authorization or are individual services performed at the request of a member of the public. The legislative history of the Appropriations Act confirms this view. Instead the Commission relies on the general phrasing of the Circular and argues that its regulation has provided "business stability" to the industry and "enabled (CATV systems) to obtain more immediate gains or values." Impartial observers, including the Commission itself, have concluded that the principal thrust of the Commission CATV regulatory scheme has been to stifle the development of CATV to protect the television broadcasters.

The Commission claims to have considered in a proper manner the factor of "value to the recipient" in establishing its CATV annual fee. After over three years and subsequent to the filing of petitioner's brief in this Court, the Commission has reversed itself and admitted that it did not have any other documents or information related to "value" of its CATV regulation in establishing its CATV fee schedule. In an overwhelming desire to recover its total CATV regulatory costs the Commission has established an annual

fee based solely on its determination (although improper) of its direct and indirect cost of CATV regulation.

ARGUMENT

I. The Critical Issue Is Not Whether the Entire CATV Industry Is an Identifiable Recipient But Whether There Exists a Special Benefit to Each CATV System Justifying the Annual Fee.

NCTA, in its brief, argued, that the Commission's regulation of the CATV industry provides no benefit or other thing of value, and certainly not to an identifiable recipient. Furthermore, NCTA observed that the value or benefit must be provided to a specific identifiable recipient. It cannot be to the public generally or the CATV industry as an amorphous entity. Most CATV systems do not avail themselves of Commission service in any given year and thus, are not an identifiable recipient. (Pet. Br. 32). Consequently, there simply is no related benefit or service in the Commission's 1970 CATV regulation which would justify the imposition of an annual fee on all CATV systems recouping the total cost of all Commission CATV regulation.

The Government maintains that the Petitioner's argument has misread the intent of the Appropriations Act and its legislative history. It attempts to avoid identifying any special benefit, and argues that the question is, in fact, whether the CATV industry as a whole rather than individual CATV systems, may properly be considered an identifiable recipient.

The Government's brief arranges the issue in this fashion:

> In effect, according to NCTA, fees cannot be assessed under 31 U.S.C. 483(a) unless they are tied

> to specific services directly rendered to an individual applicant. The cost of regulatory activities which confers benefits on the industry as a whole, however, are unrecoverable, even when fairly prorated among its members. (Res. Br. 33)

The brief continues:

> Whether the Commission processes a particular CATV operator's application or provides particular services to it during a fiscal year, each member of the industry receives special benefits resulting from the Commission's regulation of the industry as a whole. It is accordingly reasonable, as in furtherance of the statutory purpose, for members of the industry as a whole to be assessed a pro rata portion of the cost of the regulation which produces these benefits. (Res. Br. 34)

If in every year each CATV system obtained the necessary special benefits beyond those accruing to the public at large, the correctness of the government's argument could not be faulted.[1] But the Commission simply cannot overcome its lack of identification of the special benefit by arguing that a *group* as well as an individual recipient which avails itself of special benefits during the year could have the costs of its regulation recovered by annual fee.[2]

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[1] The Government's argument also presumes that the cost of the agency's general regulatory activities conferring the benefits on each CATV system are "fairly pro-rated among its members." (Res. Br. 20, 23)

[2] The Commission states that NCTA opposed an annual fee based on CATV subscribers. (Res. Br. 38) If the requisite special benefit to an identifiable recipient were present, the allocation of the cost of providing the benefit on a per subscriber basis would become a pertinent issue. NCTA's argument is, in fact, that when CATV systems do not avail themselves of the special benefit, an annual fee based on fees from each subscriber is an unconstitutional tax on gross revenue.

The Court in *New England Power Co.* v. *Federal Power Commission*[3] was faced with this same agency argument and rejected it:

> Indeed under the Commission's order, petitioners would be liable for the annual assessment despite the fact that they had no proceedings before the Commission for that year. In effect then the contemplated charges would have no relation to specific services or benefits rendered. The Commission's inadequate response that the identifiable recipient is the whole industry assumes that each company receives a benefit directly proportional to revenue. *This assumption is erroneous in that in any given year some companies may require substantial services from the Commission while others may neither require nor desire them.* (Emphasis added) (Cert. D-8)

Indeed, the Government brief, relying on the same argument that the CATV industry as a whole may be an identifiable recipient, avoids identifying what special benefits accrue to each and every CATV system each year justifying the industry-wide annual fee approach. With this failure, as *New England Power* demonstrates, the abstract argument which the Commission raises is irrelevant.

The facts clearly demonstrate that the Commission's CATV regulations in 1966 resulting in the protracted freeze on growth and even continuing today do not each year confer on every CATV system special benefits above and beyond those accruing to the public at large.

In a related effort the Government declares that NCTA attempts to deny the Commission any authority

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[3] 467 F.2d 425 (D.C. Cir. 1972).

under the statute to impose "annual fees" as distinguished from filing fees: (Res. Br. 33)

> (NCTA) attempts to deny the Commission's authority to impose "annual" fees, claiming that the statute recognizes an inherent distinction between "filing" and "annual" fees.

While the Government chooses to argue the propriety of an annual fee *per se* to recover regulatory costs, this again is not the issue to be decided here. The issue restated is whether the Commission at the time it exacted its 1970 annual fee on each CATV system conferred the requisite special benefit on CATV systems required by the Title V of the Independent Offices Appropriations Act (65 Stat. 290; 31 U.S.C. 483(a) (1952)) and the Bureau of the Budget Circular No. A-25 and, if so, whether the annual fee charged to particular CATV systems is related to any such statutory "benefits".

II. The Government Has Failed To Demonstrate That the Commission's CATV Regulation in 1970 Resulted in the Special Benefit to an Identifiable Recipient Within the Meaning of the Appropriations Act.

NCTA maintained in its brief that the Commission's regulation existing at the time of the imposition of the 1970 annual fee does not provide the requisite special benefit to uphold the annual fee. The Commission's "ancillary" jurisdiction of CATV had frozen the growth of the industry. (Pet. Br. 20-24) NCTA further stated that the Commission regulation of CATV is not an "authorization" of a CATV system's operation but rather is a tool used to restrict its service and thereby its competition to the television broad-

caster. (Pet. Br. 27-30) Indeed, the franchise to operate is granted at the local level for which annual franchise fees are paid.

Nowhere in the Commission's 1970 *Notice of Proposed Rulemaking* or *Report and Order* in Docket 18802 did the Commission provide any indication or identification of the special benefit to CATV to justify the imposition of the annual fee. The extent of the Commission's rationale as set forth in both documents was simply stated in the Commission's *Notice of Proposed Rulemaking in Docket 18802:*

> The first area concerns Community Antenna Television systems which, as interstate communication services, are permitted to operate only in accordance with Commission rules and regulations adopted during the past 5 years. The Commission's authority to regulate the conduct of CATV activities under various permissive and restrictive regulations was affirmed by the U.S. Supreme Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). Its regulation of this type of interstate communication service now constitutes a substantial portion of the Commission's responsibilities and a major staff unit has now been given permanent status to deal with this area. *While the Commission's regulatory approach does not require a prior approval by the Commission in the form of a license before one may provide this communication service to subscribers, the rules and regulations which have been adopted affect every CATV system and, in effect, each of the more than 2,240 operating CATV systems has been given general authorization to provide this interstate communication service in accordance with applicable rules and regulations.* There, therefore, appears to be no reason for distinguishing this service from other communication services

> which the Commission authorizes and which are now encompassed in the present fee schedule. (Emphasis added) (A-5)

This was repeated verbatim in the *Report and Order*. (A. 41)

It is common sense that, insofar as communications regulation is concerned, the "special benefit" or the thing which is of "value to the recipient" is a license or similar authorization with all the attendant benefits and privileges issued by the Commission.[4] The Government in its *Report and Order* and elsewhere does concede that at the time the annual fee was imposed the Commission did not license cable systems. (Pet. Br. 28) Nor does it do so today. (Pet. Br. 27-30) But in an effort to squeeze CATV into a special beneficiary status, the Commission claims that CATV received authorizations to carry broadcast signals tantamount to a license which are of some value to CATV. The Government states:

> Cable television operators enjoy numerous special benefits, "above, and beyond those which accrue to the public at large," and which warrant fee assessments to receive regulatory costs. They benefit most fundamentally from Commission authorizations to carry television broadcast signals. *Commission rules predating and postdating the 1970 fee schedule either have required express Commission permission for signal carriage, or only allowed carriage in a manner consistent with specific guide-*

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[4] In the midst of debate found in 107 Cong. Rec. 14587-88 (August 3, 1961), Congressman Jones of Missouri spoke of *"licensing of the facilities on which the Federal Communications Commission issues a license,"* and of levying fees on those "who are benefitting from *these licenses,"* and of the Commission's "authority to levy a *license fee."* (Emphasis added)

> *lines.* As the representatives of the industry, engaged in the distribution of television signals, NCTA can hardly argue that the right to carry signals does not constitute a special benefit under Title V or Bureau of the Budget Circular No. A-25. (Emphasis added) (Res. Br. 19)

At the time of the imposition of the annual fee the great majority of CATV systems had never requested authority from the Commission in order to provide their signal reception service. The Commission rules did not require it. CATV systems, in certain situations, were required to give minimum notice to television broadcasters before beginning service.[5] The so-called "authorization" of which the respondent speaks is the regulatory method by which the Commission restricted CATV systems' competition with broadcast stations by preventing certain signal carriage.

The Commission, in an effort to balloon its alleged "authorization" of CATV operation in 1970, attempts to minimize the scope of the local franchise of CATV systems. It declares:

> Contrary to petitioner's allegation, CATV systems do obtain their right to operate from the Commission. Without Commission authorization (since 1972 through a formal certificate of compliance) they could not carry broadcast signals. All that the CATV systems obtain from local governments is the right to set up their cables; that franchise would be of little use without the Commission's authorization to carry signals on those cables subject to its regulation. (Res. Br. 29)

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[5] The Commission's *Report and Order* in Docket 18802 provided a series of filing and application fees when relief from the Commission's signal carriage restrictions were sought.

The Commission itself recognized the dominant role of the local government in authorizing CATV operation. In declining to undertake the licensing of CATV systems in its 1972 *Cable Television Report and Order,* the Commission rationalized:

> *The comments advance persuasive arguments against federal licensing. We agree that conventional licensing would place an unmanageable burden on the Commission.* Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts. (Emphasis added) 36 F.C.C. 2d 207 (1972)

A franchise, in addition to regulating a CATV company's use of the public streets under the police powers, will prescribe various terms and conditions under which the operation of a CATV system could be maintained, *i.e.,* provisions controlling CATV subscriber rates, internal records and books, location of offices and operational and technical standards. The franchise may also provide for the provision of free channels for educational and governmental use, and for free service to school systems and other public institutions. It is, in fact, the document that coordinates the establishment of CATV services in the community on the public rights of way similar to the Commission's grant of broadcast licenses in the public electromagnetic spectrum.

Apart from the "authorization" argument, it was only during judicial review that the Commission came forward with any rationalization of special benefits to support its annual fee.

As the basis for its annual CATV fee, the Commission takes a quantum leap from its regulation of CATV to its "authorization" of CATV operation to "permitting (CATV) to carry and distribute for profit broadcast television signals."

The Government brief argues that:

> The question whether Commission signal carriage authorization should be specifically characterized as a "benefit," "privilege," "authority," "use,' "license," "certificate,"' "or similar thing of value" is immaterial. For, however characterized, the Commission grants each cable operator a special "benefit" within the meaning of Title V by permitting it to carry and distribute for profit broadcast television signals in competition with regulated television stations which must pay for every hour of programming they transmit. (Res. Br. 23)
>
> * * *
>
> Clearly, the privilege of "exploit(ing) the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution (Footnote omitted) enables the members of the industry to obtain more immediate or substantial gains or value . . . than those which accrue to the general public." (Res. Br. 31)

The Commission's posture appears more as a collector of copyright fees or an equalizer of "unfair competition". While Congress may require copyright fees as a result of the use of copyrighted material encompassed in broadcast signals, the Commission cannot exact annual fees from CATV under the Appropriations Act on the grounds that CATV provides a reception service for broadcast signals for profit.

The function of CATV systems' carriage of broadcast signals was described succinctly by this Court in

Fortnightly Corp. v. *United Artists Television, Inc.*[6] when it stated:

> Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewers television set. (Footnote omitted)

Petitioner's brief thoroughly examined the Commission's disasterous CATV regulatory scheme existing at the time of the imposition of the annual fee in 1970. (Pet. Br. 18-31) One really must stretch the imagination to conclude that the existence of a freeze of CATV growth in television markets containing over four-fifths of the nation's population is a specific, identifiable privilege or benefit to CATV.

As to its CATV regulatory program existing in 1970, the Commission, before the Court of Appeals, could provide after the fact allegations of only a single specific action of the Commission as the requisite special benefit or thing of value—the telephone and broadcast cross-ownership regulations. The Fifth Circuit in *Clay Broadcasting Corp.* v. *Federal Communications Commission,*[7] similarly forced to go outside the Commission's *Notice* and *Report and Order,* also focused on these rule makings as the necessary benefit to the identifiable recipient to justify the exacting of annual fees. (Cert. A-17) But as the Petitioner's brief points out, ownership restrictions simply determine who may not own CATV systems in given circumstances and do nothing to enhance the value of the

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[6] 392 U.S. 390, 400 (1968).

[7] 464 F.2d 1313 (5th Cir. 1972).

system itself. (Pet. Br. 30-31.) Thus cross-ownership prohibitions are designed, not for the benefit of the industry, but for the benefit of the public either by foreclosing monopolies in broad-band communications or preventing the media from limiting channels of communications in given communities.

An analogous competitive climate argument, as the requisite statutory benefit, was rejected in *New England Power Co.* v. *Federal Power Commission, supra,* where the Court held that an economic climate was not the requisite special benefit and the particular utility not the "special beneficiary" or "identifiable recipient" of such climate any more than any other company or consumer in general. (Cert. D-8.)

The Commission itself, in adopting its *Final Report and Order* in Docket 18509,[8] instituting the telephone cross-ownership rules, demonstrates that the primary intention in enacting the open entry regulation was the benefit of the public interest, not CATV systems as identifiable beneficiaries. The Commission declared its view that:

> We believe that the public interest in modern and efficient means of communications will best be served, at this time, by preserving, to the extent practicable, a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities. We are of the opinion that the preservation of such competition will best be assured by the exclusion of telephone companies in their service areas from engaging in the sale of CATV serv-

[8] 21 F.C.C. 2d 307 (1970).

> ice to the viewing public except where no practical alternative exists to make such service available within a particular community. *Supra,* at 325.

The Court in *New England Power, supra,* concluded that "the regulation of these (utility) industries is primarily for the benefit of the public" and that "in the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury." (Cert. D-9) The Commission's cross-ownership regulations can be characterized in the identical manner.

Both Congressional and Budget Bureau direction demands that there must be a "special benefit to an identifiable recipient *above and beyond* those accruing to the public at large." The special benefit does not have to be to the exclusion of public benefit. An examination of the Commission's filing and grant fees demonstrate that the Commission action involved confers benefit on the general public and yet these fees are not at issue here.

The paucity of *any* regulation existing in 1970 with even remote special benefit to the individual CATV system or to the industry in general is obvious. As a result, the Government's brief is replete with references of beneficial CATV regulation in its recent *Cable Television Report and Order* in the Federal Register effective March 31, 1972, two years after the Commission imposed the CATV annual fee at issue here.[9]

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[9] These new CATV rules had been adopted, not as a result of extensive rulemakings as the Commission suggests, but as a result of a consensus agreement entered into by the National Cable Television Association, the National Association of Broadcasters and the Committee of Copyright Owners in November, 1971. The Consensus

(footnote continued)

But NCTA submits to this Court that *ex post facto* efforts prior to final judicial review cannot remedy the defect of the agency's prior action. These Commission 1972 regulations did not exist at the time the 1970 fee was established. The Commission did not consider them in its *Notice of Proposed Rulemaking* nor its *Report and Order*. These 1972 CATV regulations were not before the Fifth Circuit in *Clay Broadcasting* nor did the Fifth Circuit consider them in its decisions presently before this Court for review.

The Government relies on its 1972 requirement of a certificate of compliance for CATV systems. (Pet. Br. 6-7) Even these regulations do not provide the special benefit. Existing CATV systems are not required to obtain the so-called certificate of compliance until March 31, 1977.[10] Similarly, most existing systems are not covered by the Commission's 1972 franchise guidelines until 1977. Yet it is these existing systems which have been required to pay millions of dollars in CATV annual fees since 1970.

Agreement was agreed to by the CATV industry after concluding that broadcaster and other political pressure on the Commission dictated that it was not going to act to relax the freeze on CATV. The recent study of the Brookings Institute of the 1972 Commission's *Cable Television Report and Order* describes this arm bending on the part of the White House and the Commission to continue protection of broadcast interests, and the resulting Commission action. *Infra*, p. 20.

[10] As to its requirement for a certificate of compliance the Commission established the following effective date:

> A system in operation on March 31, 1972 does not have to file an application for certification if no new signals are added to the system, but will have to apply for certification when its current franchise expires or by March 31, 1977, whichever comes first. *Cable Television Report and Order*, 36 F.C.C. 2d at 186.

The Government makes much of its 1972 regulation which protects CATV systems "from exorbitant revenue raising franchise fees." The impetus for the Commission's original proposal was the decision of the United States Court of Appeals for the Sixth Circuit in *Wonderland Ventures, Inc.* v. *City of Sandusky*,[11] the law was already established that CATV franchise fees could not be unreasonable.

In summary, however, reliance on any of its new CATV regulations forces the government to argue that an annual fee imposed on CATV systems in 1970 is supported by alleged benefits not imposed until almost two years later and not available to the CATV systems paying the annual assessment in many cases until 7 years later. These arguments must be ignored.

III. Comprehensive Review of the Bureau of the Budget's Guidance and the Legislative History of the Appropriations Act Contradicts the Commission's Rationale for Its CATV Annual Fees.

The Commission, contrary to petitioner's argument in its brief, maintains that it has followed the policy directives of the Bureau of the Budget and that its annual CATV fee "is entirely in accord with the guidelines set forth in Bureau of the Budget Circular No. A-25." (Res. Br. 30)

The Budget Circular provides illustrative examples where a special benefit will be considered to accrue to holding that franchise fees may not exceed the local government's cost of regulating the franchise.[12] Thus,

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[11] 423 F.2d 548 (Sixth Cir. 1970).

[12] *See, Notice of Proposed Rulemaking*, in Docket 18892, 25 F.C.C. 2d 50 (1970).

an identifiable recipient justifying an agency charge. The Commission never refers to the Budget Bureau examples, nor gives any reason for such failure. These illustrative examples were obviously meant to limit the Bureau's general phrasing consistent with the terms of the Appropriations Act and the Circular requiring an identifiable recipient.

To the contrary, the Commission relies instead on the general phrasing of subsection (a), (b) and (c) of the Circular. Even this does not support the Commission's position. For example, subsection (c) of the Budget Circular states that a special benefit will be considered to accrue when a Government service is performed *at the request of the recipient and is above and beyond the services received by other members of the same industry or group or of the general public.* Even under its reliance on an overly broad interpretation, the Commission admitted the inapplicability of subsection (c) since the CATV industry had opposed Commission jurisdiction. However, the Commission's manipulation of subsection (c) points to the fallacy of the overall logic of its annual CATV fee.

The Commission states that NCTA requested the Commission to bar telephone carriers from engaging in the CATV business in markets where they provide telephone service. (Res. Br. 32) Subsection (c) indicates the need for both a request and a service *above and beyond the services received by other members of the same industry.* Many existing CATV systems paying the annual fees had no interest or concern with telephone ownership of CATV. More dramatically, those telephone company-owned CATV systems continuing to operate since 1970 on an interim basis must

pay the annual fee despite assuredly finding no service in this regulation.

The Commission also argues that under subsections (a) and (b), the agency's general CATV regulatory scheme in 1970 enabled CATV systems "to obtain more immediate or substantial gains," provided "business stability" and "ensured public confidence in the business activity of [CATV]."

In *New England Power, supra,* the Court rejected the argument of the FPC and found that the creation of "economic climate" is not a special service nor is a particular company a "special beneficiary" of such climate any more than any other company or the consumer in general. The Court concluded that the regulation of the gasoline and power companies was primarily for the benefit of the public.

NCTA maintains that while the issue is not whether the Commission's general CATV regulation produced "business stability" and "public confidence" in the cable television industry, the Commission's 1970 regulating scheme has resulted in a lack of confidence in the industry among investment bankers and others about CATV's potential for growth.[12]

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[12] On June 30, 1971, exactly one year after the imposition of the CATV annual fee, Mr. Guy C. Roberts of the Massachusetts Mutual Life Insurance Co. and Mr. Roger J. Schulz, Assistant Vice President of Morgan Guaranty Trust, New York, at a Financial Seminar sponsored by NCTA, stated that capital availability to the CATV industry had been greatly diminished because of the confusion and uncertainty of the Commission's CATV regulations. *See, Toward the Wired Nation*—The Financial Implications of Developing Cable Communications (transcript of the proceedings) p. 40.

A recent study by the Brookings Institution entitled "The Economic Aspects of Television Regulation" [14] provides an impartial and expert view of three noted economists as to the true effect of the 1972 Commission regulation on the business stability of the CATV industry. After describing the Commission's efforts to limit the immense benefits of cable television in order to protect over-the-air broadcasting the study concludes:

> The FCC August (1971) letter of plans for CATV regulation reflect this minimal view of signal importation. *The November 1971 accord* [*Consensus Agreement*] *between the broadcasting and cable industries, ratified virtually intact by the FCC the following February* [*The Cable Television Report and Order*] *implied an even more restrictive view. This accord is said to be the result of FCC and White House pressure, and reflects the sort of compromises and sacrifices of consumer welfare described in Chapter 4.* (Emphasis added) *supra*, p. 179.

The impact of the continued restrictions on the carriage of broadcast signals and other potential CATV services will be stifling to the development of CATV for years to come.

Brookings declared:

> The accord [The 1972 Cable Television Report and Order] places in jeopardy the wiring of the nation—particularly in the top fifty markets that comprise two-thirds of the television homes. Our calculations cannot estimate the probable penetration of such a restricted system, since present broadcasting has no counterpart to such a hybrid.

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[14] R. Noll, M. Peck, J. McGowan, *Economic Aspects of Television Regulation*, 1973.

> *Most likely, these restrictions will stunt cable development for another decade.* (Emphasis added) *Supra*, p. 181.

Outside this litigation the Commission has been quite candid about its CATV regulatory approach. On October 12, 1973, Dean Burch, Chairman of the Federal Communications Commission, stated in a speech to CATV operators in Rockford, Illinois:

> There is, indeed, everything to be said for giving the consumer a choice—which leads me to a few concluding observations about the regulatory process in general. I sometimes think the only people who enjoy regulation more than the regulators are the object of all our attention, the regulatees. Present company is, of course, excluded. *In any event, the FCC has spent more time and effort during the last decade holding cable television back than regulating it.* (Emphasis added.) Address by the Honorable Dean Burch, Chairman, at the Rockford Cablevision Dedication. p. 5.

Thus, it is clear that even with the improper deletion of the specific examples, the general Bureau of the Budget guidelines still do not support the Commission's annual fee schedule. A more detailed examination of the Circular further erodes any Commission support from the Bureau of the Budget.

The Commission, in quoting from the Circular, omitted the Budget Bureau policy statement. The General Policy section of the Circular states:

> 3. General Policy: A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of government service or property from which he derives a special benefit. (A. 143)

Thus reasonable charges can be levied on each identifiable recipient only when there is a measurable unit of government service from which he derives a special benefit.

Furthermore, the Circular's series of illustrative examples of specific benefits in section 3 (a) and (b) were intended to give clear meaning to the broad phrases such as "immediate or substantial gains or values," "business stability" and "public confidence." To rely on the broad interpretation advocated by the Commission would result in the courts being forced to determine for each industry whether an agency's regulatory programs "provided business stability" or "ensured public confidence in the business activity of the beneficiary." Neither Congress nor the Bureau of the Budget intended to impose such a burden.

Each and every one of the specific benefits illustrated in the Circular involves the receipt of a formal authorization such as certificates of operations of business, licenses, patents, or are individual services performed at the request of a member of the public. The Commission has provided nothing of this nature to CATV systems justifying the CATV annual fee.

NCTA is accused of ignoring the legislative history in arguing that the Appropriations Act was not a broad revenue raising measure designed to insure that every facet of an agency's regulatory scheme is self-sustaining.

NCTA, in its brief, alluded to the legislative consideration of the Senate Committee on Expenditures in the Executive Department in the second session of the 81st Congress. In report No. 2120, entitled "Fee for Special Services" the Senate Committee reached its conclusions on "the practicality and propriety of

establishing fees for services which the Federal Government renders to special interests."

The interest of the Congress in agencies being reimbursed for costs of regulation was limited by the Committee as follows:

> The committee's approach, therefore, is not from a revenue-raising perspective, but is rather with the view of determining the feasibility of offsetting items now necessarily included in the Federal budget as nonreimbursable by transferring the financial burden thereof to the special beneficiaries. Thus, at the outset, it is desired to draw a clear line of distinction between services which the Federal Government renders, either upon request or by law, to special interests to which benefits thereby accrue at the expense of all the taxpayers, and services for which the Government is inherently liable and the benefits of which accrue to the people at large. *Id.* at p. 1.

The Committee continued this approach:

> There has been no quarrel with the philosophy governing the study that those who receive the benefit of services rendered by the Government especially for them should pay the costs thereof. In the several staff reports and press releases which have been issued, occasion has been taken to reiterate that philosophy and to give reassurance that there is no thought here to establish a system of fees for fundamental Government services, but only to explore the feasibility and fairness of shifting to special beneficiaries the expense now being borne for them by the taxpayers at large. *Id.* at p. 3.

The Senate Committee Report provided examples of services which would justify equitable fees. The processing of applications or grant of a broadcast license

by the Federal Communications Commission was considered an appropriate benefit. The Report stated:

> The Federal Communications Commission renders a tremendous variety of services, a substantial number of which would lend themselves to equitable fees. The Commission processes applications and grants permits for the construction and operation of commercial radio stations. Such an operating permit is in effect a franchise to a segment of the radio audience. The Federal Government sees to it that the right to that audience is not disturbed, and the operator is thus able to insure to purchasers of time over the facilities access to the market addressed. Construction permits constitute the Commission's heaviest workload, involving in an increasing number the necessity of formal hearings so as to provide a sound basis for granting or denying an application. This is a costly process and one which the Government renders without charge. True, the applicant himself may be put to some personal expense in the filing of his application and through attendance at a subsequent hearing, but he does not defray any of the cost to which the general public is put to conduct a proceeding which may assure to the applicant a remunerative business under special Federal protection. This is an outstanding example of a service for which a fee may most appropriately be assessed.

The Government cited the statement of Representative Yates during the debates of Title V of the Appropriations Act as explanatory of the statute's purpose. (Res. Br. 24). Had the Government continued further into Representative Yates' testimony, it is difficult to believe they would have submitted his testimony to support the Commission's CATV assessment—an annual fee unrelated to any specific benefit and recovery of the total cost of Commission regulation.

Representative Yates continued:

I think also that the Government should be able to recaputure *some of the costs* that go into the hearings of the other regulatory agencies. Such fees are appropriate for many of the hearings which take place before the Interstate Commerce Commission. I know that in my home city of Chicago the city requires the owner of every building which operates a passenger elevator to obtain a license for that elevator, and in order to recoup the costs for inspection in such licensing it required a rather nominal licensing fee.

The Interstate Commerce Commission in required to inspect locomotives of railroads, safety appliances, signaling systems, various facilities of that type. The Government pays every cent for this operation. In addition to that, much of the work of the Interstate Commerce Commission is involved with hearings on *applications for certificates of convenience and necessity* for bus lines and other common carriers. The Government assumes the complete cost of such hearings in spite of the fact that here again it grants a franchise which is very valuable to the company making the application and in the operation of which franchise it is protected from competition.

Each of the Commissioners who appeared before us was asked his opinion as to whether or not it was feasible to charge *for a portion of the operations* of the agency and in each event the Commission thought that it would be practicable. Not only that, one Commissioner expressed the viewpoint that such a practice would not only be feasible but would deter and do away with many superfluous applications. Therefore, the subcommittee in its deliberations decided to put a new legislative section into the bill which would permit each of the agencies to appraise its own

> operations to see whether or not it would be possible to recapture for the Government *some of the costs* that the Government incurs in connection with this regulation through the establishment of a schedule of fee. 97 Cong. Rec. 4809(1951)

The intent of Congress in enacting Title V of the Appropriations Act was to permit charges for specific licensing types of service. Those charges would relate to the grant of the service and would not be used to recoup the total cost of all aspects of an industry's regulatory program.

IV. Recent Commission Admissions in Conjunction With the Other Evidence, Demonstrate That It Failed To Consider Value to the Recipient in Establishing Its CATV Annual Fee.

As evidenced above the Commission has not fulfilled the requirements of the Appropriations Act and the Circular that in order for a fee to be exacted there must be an "identifiable recipient" of a "measurable unit" of service from which he obtains "value" or "special benefit." The Appropriations Act also requires that the charges must be fair and equitable, taking into consideration value to the identifiable recipient as well as the direct and indirect cost,[15] public interest and other factors.

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[15] The government's brief suggests that NCTA "concedes that the Commission properly considered the 'direct and indirect' cost" in setting its annual fees. (Res. Br. 37.) The Commission is well aware of NCTA's substantial concern with the Commission's computation of its direct and indirect cost of regulations in establishing the 1970 annual fee. In its comments in 1970, to the proposed CATV fee schedule, NCTA complained of miscalculations in the Commission's computation of CATV regulatory costs. This argument was pursued in the Fifth Circuit, but the Court chose not to respond to that issue. This error was mentioned in Petitioner's Brief before this Court but subdued to the broader value and

(footnote continued)

NCTA, in its brief, charged that the Commission totally ignored or substantially misconstrued the statutory factor of "value to the recipient" in establishing its CATV annual fee. (Pet. Br. 34-41). The Commission had no other choice but to avoid this statutory requirement since, as NCTA has shown, no appropriate "value" or benefit resulted from the Commission's regulation of cable television systems. There simply was "no work, service . . . benefit . . . franchise, license, permit . . . or similar thing of *value* performed, furnished, p r o v i d e d" which would authorize the imposition of the annual fee on each and every CATV system.

If the Commission considered "value to the recipient", it improperly construed that value as CATV system profitability. The Commission's own admission, as pointed out in Petitioner's Brief, confirms this error. (Pet. Br. 36-38).

A very recent admission of the Commission provides further overwhelming evidence that no proper value or benefit to the recipient CATV systems did exist. Following the release of the Commission's *Notice of Proposed Rulemaking* in 1970, NCTA sought to obtain information from the FCC, under the Freedom of Information Act, relating to its consideration of value or benefit of its CATV regulation. In response, the

benefit issue. (Pet. Br. f.n. 38). However, additional information made available on August 1, 1973, in settlement of its freedom of information litigation, in *National Cable Television Association, Inc.* v. *Federal Communications Commission*, 479 F. 2d 183 (1972) has confirmed the substantial error in CATV cost computation. The CATV industry, for example, was charged $188,726 of the Commission's Field Engineering Budget rather than the $12,308 which the Budget Bureau had allocated to CATV for the fiscal year 1971.

Commission's Executive Director asserted that the Commission had such documents.[16] However, the Executive Director denied NCTA access to this information because it was alleged to be of a confidential nature and therefore exempt under the Freedom of Information Act. In a hearing on the Commission's Motion to Dismiss before the United States District Court for the District of Columbia, the Executive Director was questioned by NCTA counsel as to the existence of particular documents related to "value to the recipient" of the CATV regulation. He confirmed that the documents did exist in the files of the Commission, but would not be available to NCTA.

However, subsequent to the filing of Petitioner's Brief before this Court, the Commission totally reversed itself. The Court of Appeals decision in *National Cable Television Association, Inc.* v. *Federal Communications Commission, supra,* reversing the District Court's dismissal, required the Commission to either provide the documents and information on value for NCTA or to establish a statutory exemption. (Pet. Br. 38-40). In settlement of this appellate order, the Commission's General Counsel, in a letter to NCTA, dated August 1, 1973, admitted that it possessed no doucments or other information related to value to the recipient CATV systems other than the information contained in the *Notice* and *Report and Order* in Docket 18802.[17]

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[16] Letter of Max Paglin, Executive Director of the Federal Communications Commission of March 25, 1970. (Pet. App. 1A.)

[17] The letter stated in pertinent part:

> The Commission and NCTA further agree and stipulate that my staff has searched the record in an effort to discover any documents or other information used to determine "value to the recipient" of cable regulation for fiscal year 1971. After a

NCTA's brief has referred to the finding of the District of Columbia Circuit's decision that the Commission had failed to "supply any specifics" or "definition and qualification" of value to the recipient in its *Notice of Proposed Rulemaking* in Docket 18802.[18] (Pet. Br. 39)

Faced with the Court of Appeals order, the Commission was forced into damaging contradictions, buffered only by the obligatory reliance on its *Notice* and *Report and Order*. After over three years of litigation, the Commission, by its own admissions, has demonstrated that it has ignored the standards of the Appropriations Act and acted arbitrarily and unreasonably in establishing the 1970 annual CATV fee. The Commission has no factual basis for assessing the value to CATV systems from its regulation beyond conjecture of some CATV systems' profitability. Are there no limits on fees of a government agency?

Regulation of an industry cannot permit an agency to state inherently that it therefore provides an authorization of that industry's operation to its benefit or that a single regulation benefits the ownership possibilities of all industry members. If an agency can with such claims recover every dollar spent for each industry regulatory program, agencies will con-

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thorough search, we represent that with respect to the *Notice of Proposed Rulemaking*, 35 Fed. Reg. 3815 (February 18, 1970), we do not possess any documents or other information used to determine value to the recipient CATV systems, other than the information contained in the referenced *Notice* and subsequently adopted *Report and Order* in Docket 18802.

[18] This finding was required under the Freedom of Information Act to determine whether NCTA's request for this information was "identifiable" in relation to any reference by the Commission to "value" in its *Notice*.

tinue to seek higher Congressional appropriations on the grounds that no individual taxpayer's money will be involved. Higher appropriations mean higher regulatory costs and the need for higher annual fees. [19]

Three years have passed since first effort to recover its total regulatory cost the Commission's and its budget has risen 75% to 42 million dollars. The Commission is already engulfed in this vicious circle.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Fifth Circuit should be reversed as to the annual charges levied against CATV systems by the Federal Communications Commission.

Respectfully submitted,

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[19] As Petitioner pointed out in its brief (Pet. Br. 9 f.n. 11), the Commission, in a *Notice of Proposed Rulemaking* in Docket 19658 of December 27, 1972, 38 F.C.C. 2d 587, less than three years after its initial annual assessment, has proposed to increase the CATV annual assessment 33⅓ percent to 40 cents per subscriber purportedly to cover the increasing costs of implementing a variety of new CATV regulations.